SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1540

HAVEN ERICKSON, WILLIAM L. KLINGAMAN, RAY S. MCKNIGHT and JAMES O. PAUTZKE, Trustees of the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust,
Defendants-Petitioners,

and

WASHINGTON STATE ASSOCIATION OF THE UNITED ASSOCIATION, a labor union, and the WASHINGTON STATE EMPLOYERS COUNCIL FOR THE PLUMBING AND PIPEFITTING INDUSTRY, an employer association,
Additional Defendants-Petitioners,

v.

WILLIAM J. ALVARES, WILLIAM BADEN, BERNARD BROMLEY, VICTOR R. CHARCRAFT, ALBERT D. ERDMAN, ERNEST E. GRAVES, J. W. JENSEN, MILO E. KROLL, HAROLD L. SHIPMAN, JAMES M. SMITH, AUSTIN SOFIE, DANIEL B. SWEENEY, NORMAN W. SWENSON and JAMES R. YATES, individually and as representatives of a class of persons hereinafter described,
Plaintiffs-Respondents,

and

THOMAS ALBRO, WILLIAM BOTTING, PAUL HOLMES, JOSEPH MCCAFFREY, DELL PETERSON and DALE SMITH, Trustees of the Seattle Area Plumbing and Pipefitting Industry Health and Welfare Trust,
Nominal Plaintiffs-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Trustees of the Washington State Plumbing and
Pipefitting Industry Health and Welfare Trust,
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and

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a labor union, and the WASHINGTON STATE EMPLOYERS COUNCIL FOR
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THOMAS ALBRO, WILLIAM BOTTING, PAUL HOLMES,
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Trustees of the Seattle Area Plumbing and Pipefitting
Industry Health and Welfare Trust,
Nominal Plaintiffs-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review the judgment entered March 10, 1975.

OPINIONS BELOW

The following decisions and opinions of the courts below are included in the appendix hereto:

(1) Opinion of the United States Court of Appeals for the Ninth Circuit, ... F.2d ..... (March 10, 1975), Appendix A hereto.

(2) Memorandum Decision of the United States District Court for the Western District of Washington granting summary judgment of dismissal, unreported (December 21, 1972), Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on March 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does Section 301 of the National Labor Relations (Taft-Hartley) Act, 29 U.S.C. §185, require that federal courts take jurisdiction over disputes concerning nothing more than the discretionary administration of employee trust funds?

2. Does Section 301 of the National Labor Relations (Taft-Hartley) Act, 29 U.S.C. §185, subject to federal jurisdiction a controversy between employees formerly covered by a trust fund, and the trustees of the fund, where neither an employer nor a labor organization is a party to the controversy and no labor dispute is involved?

3. Does Section 302 of the National Labor Relations (Taft-Hartley) Act, 29 U.S.C. §186, prohibiting payments

by employers to labor representatives, except in certain specified circumstances, subject to federal jurisdiction a controversy over nothing more than discretionary administration of an employee trust fund, where it is undisputed that employer payments were lawfully made to a properly constituted employee trust, and the dispute concerns only the propriety of the trustees having declined to allocate reserves of the fund to individual employees who voluntarily withdrew from the trust?

4. Does either Section 301 or Section 302 of the National Labor Relations Act, 29 U.S.C. §§185 and 186, require federal courts to become involved in the detailed supervision of employee trust funds in terms of accounting matters, discretionary acts of trustees, or coverage and allocation claims made by departing employees?

STATUTORY PROVISIONS INVOLVED

Taft-Hartley Act §301(a), 29 U.S.C. §185(a) (1970), Volume 4, Page 8014:

> Suits by and against labor organizations.
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Taft-Hartley Act §302(e), 29 U.S.C. §186(e) (1970), Volume 4, Page 8016:

> Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees.

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

STATEMENT OF THE CASE

Introduction

The district court ordered dismissal of the present action, following development of a full evidentiary record on the jurisdictional issues, for the reason that no federal claim was presented. See Memorandum Decision, Appendix B hereto.

The Court of Appeals has now reversed, stating that its decision is one of first impression, the effect of which is to enlarge federal jurisdiction. See Opinion, Appendix A hereto.

Petitioners believe that the decision of the Court of Appeals, if followed, would erroneously extend federal jurisdiction far beyond the subject matter authorized and intended by Congress, and would needlessly enmesh the federal courts in hundreds of routine suits involving day-to-day administration and accounting of employee trust funds. Such matters have heretofore been, and should continue to be, litigated in the courts of the several states under applicable state law.

Nature of the Case

Plaintiffs are fourteen individual plumbers and pipefitters. They allege that they are members of Local 32 of

the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("Local 32"). Beginning in 1946, Local 32 and other United Association locals in the State of Washington began joint bargaining, on a statewide basis, with employers in the plumbing and pipefitting industry. The locals were represented by the Washington State Association of the United Association, the statewide bargaining unit.

In 1951, an agreement was reached creating the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust ("the Trust"). The Trust Agreement was a separate agreement, expressed in a separate document, supplemental to the labor-management agreement. Contributions were made by employers in amounts specified in successive statewide collective bargaining agreements.

The Trust has continued, as above, for many years. On May 28, 1967, Local 32 voluntarily withdrew from the state-wide bargaining unit. On January 2, 1968, its members withdrew from the Trust. They did not have to do so. Their withdrawal from the Trust was voluntary, and they could have continued to participate in the Trust and receive benefits thereunder even though their local was no longer affiliated with the statewide bargaining organization.

Following the withdrawal, the trustees (defendants-petitioners herein) provided to the Local 32 members the benefits which, under the terms of the Trust Agreement, were to be afforded to withdrawing members. Each member of Local 32 was permitted to run out his accumulated hour banks for several months after the withdrawal, and after contributions had ceased being made in his behalf.

The Trust still pays insurance premiums for members of Local 32 who were on "superannuated" status as of the date of withdrawal, such members representing a future liability to the Trust in excess of $50,000.

When it chose to withdraw from the Trust, Local 32 was fully aware that (1) under applicable state law, withdrawing employees were not entitled to Trust reserves, *Occidental Life Ins. Co. v. Blume*, 65 Wn.2d 643, 349 P.2d 76 (1965), (2) that employees who had previously withdrawn either individually or en masse had never before received any share of the reserve funds, and (3) that the Agreement creating and governing the Trust vested in the trustees total discretion regarding reserve funds. Nevertheless, the Local 32 members withdrew from the Trust. Certain Local 32 members then demanded that the trustees allot them a portion of the reserves allegedly existing on the date of withdrawal. After due consideration Local 32's claim was rejected. This suit followed.

Course of the Proceedings

Plaintiffs commenced this action by filing a complaint on January 30, 1970. Federal jurisdiction was alleged under Sections 301 and 302 of the National Labor Relations Act, 29 U.S.C. §§185 and 186. Plaintiffs purported to bring this suit as a class action on behalf of all Local 32 members. However, plaintiffs have never attempted to comply with the requirements of Rule 23 of the United States District Court for the Western District of Washington pertaining to class actions. Thus, this suit concerns only the rights of the fourteen individual plaintiffs herein. The trustees of the Trust were the only named defendants.

On March 27, 1970, defendant trustees moved to dismiss the complaint on the ground that the court lacked jurisdiction over the subject matter.

On August 10, 1970, the District Court ordered discovery on the questions relevant to its jurisdiction and reserved ruling on the motion to dismiss pending discovery.

Plaintiffs then filed a motion for leave to file an amended complaint, in which they sought to add the State Association and the Washington State Employers' Council for the Plumbing and Pipefiitting Industry, an employer association, as defendants. The purpose of the amendment was to counter defendants' position, expressed in support of their motion to dismiss, that jurisdiction under Section 301 of the National Labor Relations Act does not exist where neither a labor organization nor an employer is a party. An order granting leave to file the amended complaint was entered and filed on May 25, 1971.

There followed an extended period of discovery by way of depositions and production of documents, in which the parties completed all discovery considered necessary for determination of the jurisdictional issue. Nothing developed in discovery showed any basis for a claim either for or against the labor organization ("the Association") or the employers ("the Employers' Council"). On October 20, 1972, defendants moved as follows:

1. For summary judgment of dismissal in favor of the defendant Washington State Association;

2. For summary judgment of dismissal in favor of the defendant Washington State Employers' Council;

3. For summary judgment in favor of the defendant trustees, dismissing plaintiffs' purported claims for relief based upon Sections 301 and 302 of the National Labor Relations Act; and

4. For summary judgment in favor of the defendant trustees dismissing the common law claims for relief for for lack of federal subject matter jurisdiction.

Plaintiffs conceded that the motions of defendants Association and Employers' Council for summary judgment of dismissal should be granted. As to those parties the summary judgment of dismissal was thereafter granted without opposition. Upon dismissal of the Association and the Employers' Council, the suit reverted to its original nature, *i.e.*, an action by individual union members against individual trustees of a health and welfare trust fund.

Both sides prepared and submitted extensive memoranda and affidavits concerning this motion. Oral argument was held following submission of the affidavits and briefs.

On December 21, 1972 the District Court issued its memorandum decision granting defendants' motions for summary judgment and for dismissal.

An order of dismissal was accordingly entered on February 23, 1973.

Plaintiffs filed a timely notice of appeal. On March 10, 1975, the United States Court of Appeals for the Ninth Circuit reversed the decision of the district court. For the reasons stated below, a petition for writ of certiorari to review and reverse this decision must issue.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Holding That Jurisdiction Exists Under Section 301 of the Taft-Hartley Act Presents Significant Issues of First Impression Regarding the Jurisdiction of the Courts of the United States

This case presents a basic and highly significant issue: the extent of the role of federal courts in labor-management relations. The Court of Appeals expressly recognized this, noting its

> reluctance to hand down a decision that appears to enlarge the jurisdiction of the federal courts—to "fire a jurisdictional cannon which will be heard on future battle grounds". . . . Opinion, page 5.

The Court of Appeals also noted that the argument of the defendant trustees, that either an employee or a union must be a party to the action if Section 301 is invoked, "does not seem to have been expressly considered by any other federal court." Opinion, page 8, Appendix A hereto.

The Court of Appeals' holding, if allowed to stand, would extend federal jurisdiction into areas of labor-management relations in which the participation of the federal courts is unnecessary, the parties having an adequate forum in the state courts. Moreover, as will be shown below, such an extension is in fact contrary to the intent of Congress, as expressed in the Taft-Hartley Act, and is also contrary to the Constitutional principle that the federal courts are courts of limited jurisdiction. The Court of Appeals decision here is therefore significant, and commands the attention of this Court, because it involves a potential overreaching by the federal courts into areas which neither Congress nor the Constitution permits them to enter.

The role of the federal courts in labor cases is simply that of peacemaker. This function is clearly expressed in *Dowd Box v. Courtney*, 368 U.S. 502 (1961). In *Dowd*, the Court stated that the purpose of Section 301 is "to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Id.* at 509. Further,

> A principal motive behind the creation of federal jurisdiction in this field was the belief that the courts of many states could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations.
> *Id.* at 510.

Nowhere is there expressed a purpose of involving the federal courts in matters of employee trust fund administration, of concern here, absent a dispute involving an employer or a labor union. And here the plaintiffs are not even "employees," but rather are former beneficiaries of a trust from which they voluntarily withdrew and with which they are no longer connected.

The Court of Appeals relied on *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), in ruling that neither an employer nor a labor union need be a party to invoke Section 301 jurisdiction. In *Smith*, an employee sued his employer to enforce the provisions of the collective bargaining agreement. The Court found jurisdiction under Section 301 of the National Labor Relations Act, concluding that the word "between" in Section 301 refers to "contracts", not "suits". The effect of the Court's decision in *Smith* is the removal of the requirement that suits under Section 301 invariably involve a union suing an employer, or vice versa. The

Court did not consider, and therefore did not remove, the requirement that either an employer or a union must be a party.

In reaching the decision above, the Court in *Smith* relied on the purpose of Section 301. The importance of the reasoning in *Smith* to the result in that case is noted in *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968). The Court in *Smith* held, in effect, that employee-employer disputes with regard to terms of collective bargaining agreements posed as great a threat to the peaceful enforcement of those agreements as employer-union and union-union disputes. In the present case no such chance for disruption has been shown or even suggested. The merely "attenuated" danger, relied upon by the Court of Appeals, is insufficient at best and, at least, dubious. The deprivation of benefits here, if any, was purely voluntary—the plaintiffs did not have to withdraw from the trust.

The controversy here is solely between ex-beneficiaries and trustees of the health and welfare fund. A disagreement between the two will not lead to a strike. Nor, since there is no violation of any term of the Trust Agreement, will the state-federal law problem of concern to the Court in *Smith* be present. Thus the basis for the ruling in *Smith*, that an employee may sue to enforce the provisions of a collective bargaining agreement, is totally absent in the present case. To accept jurisdiction here would in no way serve the purpose of Section 301.

The Court of Appeals appears not to have considered this compelling ground limiting federal jurisdiction and directly applicable here. Without authority, the court would engage the federal courts in disputes adequately

resolved in state courts. The cases cited below are actually inapposite. *Brune v. Morse*, 339 F.Supp. 159 (E.D. Mo. 1972), *aff'd.*, 475 F.2d 858 (8th Cir. 1973), did not even consider the limits of federal jurisdiction. The same is true of *Hancock v. Central States Pension Fund*, 84 L.R.R.M. 2635 (S.D. Ind. 1973). No reason was given by the court in *Franciosa v. Bricklayers Fund Office*, 73 CCH Labor Cases ¶28,857 (S.D.N.Y. 1974), for its holding.

II. The Court of Appeals Holding That Jurisdiction Exists Under Section 302 of the National Labor Relations (Taft-Hartley) Act Presents Significant and Recurring Issues of First Impression Regarding the Jurisdiction of the Courts of the United States, and Presents a Conflict or Potential Conflict Among the Lower Federal Courts

The court below similarly extended federal jurisdiction under Section 302(e) of the Taft-Hartley Act, thereby entering another area of labor-management relations not intended by Congress. Plaintiff's sole claim in this case is that if trust reserve funds are not allocated to them, contributions to the trust on their behalf might not be paid in direct benefits to them. This is alleged to be a violation of Section 302(c)(5), which requires that Trust funds be established for the "sole and exclusive benefit" of employees. The plaintiffs do not assert that any employer *payment* to the fund was unlawful, or that the fund was not *established* for the employees' benefit. Nor do they assert that trust funds have been applied to any persons other than qualified employees. Rather, they argue only about the discretionary *administration* of a trust fund, itself lawfully established.

Plaintiffs' sole theory of Section 302(e) jurisdiction, and the sole basis relied upon by the Court of Appeals, is the idea that each trust fund dollar contributed by an employer must be expended in benefits for employees of the contributor, and no others. Opinion, page 11, Appendix A hereto. This is a question of trust fund accounting and the discretion of trustees with respect to the necessary level of reserves, and is therefore beyond the scope of subjects in which Congress intends the federal courts to participate.

The purpose of Section 302(e) is

> to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers.

United States v. Ryan, 225 F.2d 417, 426 (2d Cir. 1955) (Learned Hand, dissenting), *rev'd.* 350 U.S. 299 (1956); Opinion, page 11, Appendix A hereto.

The Court of Appeals found the legislative history regarding the purpose of Section 302(e) to be ambiguous. Opinion, page 12, Appendix A hereto. Nevertheless, it is clear that that purpose was to regulate the structure of employee trust funds and that nowhere is there expressed a purpose of involving the federal courts in accounting and administration of a lawfully established fund. Indeed, to hold otherwise would effectively transfer trusteeship of such funds to federal courts, further overburdening their already crowded dockets despite an adequate remedy in state courts.

The existence of an adequate state remedy completely removes the basis for federal jurisdiction over administrative matters. If jurisdiction under Section 301 is necessary solely to allow creation of a uniform federal labor law,

Textile Workers Union of America v. Lincoln Mills of America, 353 U.S. 448 (1957), federal jurisdiction under Section 302(e) should similarly be limited solely to matters clearly covered by legislation. The accounting and administration of lawfully established employee trust funds is not such a subject. Other federal courts have expressly recognized this limitation. *Fiorelli v. Kelewer*, 339 F.Supp. 796 (E.D. Pa. 1972), *aff'd. without opinion*, 474 F.2d 1340 (3d Cir. 1973) ("although it has been questioned, it is now firmly settled that by enacting Section 302 Congress did not intend federal courts to fashion federal law concerning the administration of trust funds established pursuant to it." 339 F.Supp. at 799); *Giordani v. Hoffman*, 295 F.Supp. 463 (D.C. Pa. 1969) (matters of daily internal administration "do not constitute a satisfactory federal jurisdictional basis and properly should be adjudicated in the state courts," 295 F.Supp. at 471); and *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 426 (1st Cir. 1968) ("violations" in Section 302(e) means "violations of basic structure as determined by Congress, not violations of fiduciary obligations or standards of prudence in the adminisntration of trust funds").

The holding in *Fiorelli*, adopted without opinion by the Third Circuit in affirming, and the opinion in *Bowers*, at least indicate a potential conflict among the circuits requiring the attention of this Court. The decision in this case is directly contrary to that of *Fiorelli*, for example, for here the Court of Appeals has thrust the federal courts into the very center of trust administration.

A similar conflict is presented in the Court of Appeals' at least implicit adoption of the theory that employer contributions must be matched on a dollar-for-dollar basis in

benefits to the specific employees on whose behalf such contributions were made. *See, Insley v. Joyce*, 330 F.Supp. 128 (N.D. Ill. 1971), *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965) (the "sole and exclusive" benefit requirement of Section 302(c)(5) is "met when benefits are restricted to persons who are *or* have been covered employees. 345 F.2d at 70 (emphasis added). There is no requirement that contributions be matched to benefits for empolyees on whose account such contributions were made). Indeed, the Court of Appeals' own holding in *Garvison v. Jensen*, 355 F.2d 487 (9th Cir. 1966) defeats this "matching" theory, the court there deciding that "employee" in Section 302(c)(5) includes both current *and* past employees.

The kinds of trust activities which *are* contrary to the purpose of Section 302 and which, therefore, violate the sole and exclusive benefit requirement, are completely different. For example, a trust fund established so as to allow a diversion of trust funds to the personal use of the trustees, *Porter v. Teamsters Health, Welfare & Life Ins. Funds*, 321 F.Supp. 101 (E.D. Pa. 1970), or the provision of benefits for employees of non-contributing employers, *Typo-Publishers Outside Tape Fund*, 344 F.Supp. 194 (S.D.N.Y. 1972), would violate the requirement. Plaintiffs here, however, have not even alleged violations such as those in *Porter* and *Typo Publishers*. In the face of a motion for summary judgment their sole factual contention—that in the Trust administration employer contributions will not be matched, dollar for dollar, in payments to plaintiffs—utterly fails to raise a justiciable issue under Section 302. These kinds of cases, relied upon by the Court of Appeals, are clearly distinguishable from the present case, where no diversion of trust assets is alleged.

III. The Court of Appeals Treatment of the District Court's Grant of Summary Judgment as a Dismissal for Failure to State a Claim Is Erroneous, Presents a Significant Issue of First Impression, and Conflicts With a Decision of This Court

The Court of Appeals interpreted the district court's grant of summary judgment as a decision that federal jurisdiction was lacking because averments failed to state a claim on which relief could be granted. But the district court's ruling has a much more substantial effect. It followed substantial discovery, and is more accurately interpreted as meaning that plaintiffs failed to raise any genuine issue as to any material jurisdictional fact.

Viewed in this light, as a summary judgment motion, it is clear that the district court ruling is correct and that the Court of Appeals' decision must be reversed. Plaintiffs' decision to rest on were unsupported jurisdictional allegations in the face of a motion for summary judgment is their undoing. At the very least, this case presents an issue of first impression: the manner in which the courts are to treat a summary judgment motion, following discovery and establishment of a record, regarding jurisdiction.

The Court of Appeals incorrectly determined that this case comes within the rule of *Bell v. Hood*, 327 U.S. 678 (1946). The summary judgment motion distinguishes the two, as explained below.

There are substantial reasons why the district court's ruling is correct. The motion here was made following extensive discovery in which defendants-trustees made every attempt to evoke the basis for federal jurisdiction. None appeared. Jurisdiction is of course sacred to each federal case, as reflected in the principle that jurisdiction

may be challenged at any stage of the proceedings. Moreover, the court is to challenge jurisdiction on its own motion, if grounds exist.

The novel question, in effect, is whether a party who desires to challenge subject matter jurisdiction must wait until all pre-trial matters have been concluded. *Bell v. Hood* does not hold that a party must wait. That case merely specifies the burden in the face of a motion to dismiss for failure to state a claim, and that burden is to raise averments which, if true, under any imaginable state of facts, would establish a federal claim. But a summary judgment motion forces the party opposing the motion to deal with the real facts of the case, and to put forth those in support of jurisdiction.

Moreover, in *Bell* the Court noted specific exceptions to the rule that mere allegations of federal jurisdiction were sufficient as against a motion to dismiss for failure to state a claim. One of these exceptions is "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial *or made solely for the purpose of obtaining jurisdiction*. . . ." 327 U.S. at 682 (emphasis added). Forum shopping is very much in evidence here. As noted earlier, the applicable law of the State of Washington would bar plaintiffs' claim. *Occidental Life Ins. Co. v. Blume*, 65 Wn.2d 643, 349 P.2d 76 (1965). When forum shopping is shown, more than mere averments should be necessary, and a summary judgment motion on the jurisdictional issues, made after full discovery thereon, should under *Bell v. Hood* be of more substantial effect than a motion to dismiss for failure to state a claim. The summary judgment procedure, which forces the opponent to "put his cards on

the table," should not be restricted in this area. There is no reason for so restricting the use of this procedure and, indeed, judicial economy and efficiency dictate a contrary result.

Thus, the decision of the Court of Appeals is significant, and commands the attention of this Court. Moreover, defendants are entitled to judgment as a matter of law.

Regarding jurisdiction under Section 301, plaintiffs have never gone beyond the mere allegation that defendants' failure to allocate reserves to them is a breach of the Trust Agreement. They argue under the following three sections of Article VIII of the Trust Agreement:

> 1. The Trustees shall employ the Health and Welfare Account to provide medical care, hospitalization, disability, life insurance and other welfare benefits to the Employees who become qualified and eligible therefore under the terms of this Agreement.
>
> 2. The benefits provided by the Health and Welfare Account will be paid only to the Employees who have been, or who shall hereafter be, employed or available for employment under the jurisdiction and terms of the Labor-Management Agreement subject to Article VI, Paragraph 8, above. Such Employees shall be deemed 'qualified' for the aforesaid benefits from the Health and Welfare Account, subject to the terms of eligibility established by the Board of Trustees in accordance with this Agreement.
>
> 3. The Board shall have the power to establish and determine the conditions, rules and regulations under which a qualified Employee shall become eligible for medical, hospitalization, disability, life insurance and other welfare benefits provided by the Health and Welfare Plan. The conditions of eligibility, rules and regulations shall include all factors necessary for the proper administration and the financial security of the Health and Welfare Plan . . .

The Court of Appeals relied on alleged violations of Paragraphs 2 and 3 in finding Section 301 jurisdiction. However, it is obvious that paragraph 3 does not apply to claims for disbursement of accumulated reserves. Rather, the section concerns eligibility for medical, insurance and other *welfare-type* benefits. Plaintiffs have never claimed that they were denied any welfare type benefits to which they are entitled. The essence of plaintiffs' contention is simply that the trustees, vested with wide discretion under the terms of the Trust Agreement, erred in the exercise of that discretion concerning the disposition of reserve funds.

Absent any showing of a genuine issue of fact as to alleged violations of the Trust Agreement, no claim arises under Section 301. *Fiorelli v. Kelewer,* 339 F.Supp. 796, 798 (E.D. Pa. 1972), *aff'd without opinion,* 474 F.2d 1340 (3d Cir. 1973). *See also, Leskiw v. Local 1470, Int'l Bhd. of Elec. Workers, AFL-CIO-CLC,* 464 F.2d 721 (2d Cir. 1972).

Fiorelli is similar to the instant case in that it involved the withdrawal of employees from one union to form another union. The trustees of the new union sued the trustees of the old union to recover contributions made by employers to the old union on behalf of the employees. The district court found that no claim was presented under Section 301 because plaintiffs had alleged neither the existence nor breach of any contract between an employer and a labor organization.

The Court of Appeals distinguished *Fiorelli* here by arguing that a breach of an employer-labor organization contract was not alleged in *Fiorelli,* but is alleged here. But as the District Court pointed out, "this same charge, ex-

press or implied, would underlie virtually every claim for trust benefits." Moreover, as noted above, the present case was dismissed on a motion for summary judgment following full discovery, and, therefore, mere allegations claiming a violation of the Trust Agreement are insufficient. Just as the failure to allege a violation of a collective bargaining agreement meant the absence of a claim under Section 301 in *Fiorelli* and *Leskiw,* the plaintiffs' failure to put in issue facts material to the question of whether defendants violated the Trust Agreement signifies the lack of a claim arising under Section 301 in the present case. The distinction between this case and *Fiorelli* is, therefore, one of procedure and not of result.

Nor is there any basis, even an alleged basis, for a claim under paragraph 2, plaintiffs' having conceded that benefits were paid only to qualified "employees."

None of the other claims asserted by plaintiffs relate to a purported violation of an employer-labor organization contract, and the Court of Appeals did not rely on any of them in finding a basis for federal jurisdiction.

IV. The Court of Appeals Erred in Interpreting the Scope of This Suit

The Court of Appeals relied in part for its decision that jurisdiction exists under Section 302(e) on the idea that plaintiffs here are not seeking individual specific benefits that have been denied them. Opinion, page 14, Exhibit A hereto. Rather, the Court stated:

> They seek a determination that, as a group, Local 32 members have interests in the trust as a whole which have been denied them.

Id. This was identified as a claim relating to the basic "structure" of the Trust.

This conclusion is incorrect. Plaintiffs have never complied with Local Rule 23 of the United States District Court for the Western District of Washington, relating to representative suits, and therefore they seek benefits solely for themselves and no one else.

CONCLUSION

This action belongs in state court. As a purported federal claim it is devoid of jurisdictional basis. The District Court's order and judgment of dismissal is correct in all respects, and the Court of Appeals erred in reversing. For this reason, and for the reasons stated above, a writ of certiorari to review and reverse the decision of the Court of Appeals should issue.

Respectfully submitted,

CULP, DWYER, GUTERSON & GRADER

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM J. ALVARES, et al., individually and as representatives of a class of persons hereinafter described,
Plaintiffs-Appellants,

and

THOMAS ALBRO, et al., Trustee of the Seattle Area Plumbing and Pipefitting Industry Health and Welfare Trust,
Nominal Plaintiffs-Appellants,

v.

HAVEN ERICKSON, et al., Trustees of the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust,
Trustee Defendants-Appellees.

NO. 73-1765

OPINION

[March 10, 1975]

On Appeal from the United States District Court for the Western District of Washington

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Before: DUNIWAY and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

DUNIWAY, Circuit Judge.

The limited issues on this appeal are whether the federal court has jurisdiction of the case under § 301(a) or § 302(e), or both, of the Taft-Hartley Act, 29 U.S.C. §§ 185(a) and 186(e), respectively. The district court found jurisdiction lacking. We reverse.

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*The Honorable William T. Sweigert, United States District Judge for the Northern District of California, sitting by designation.

William J. Alvares, et al. v.

I. *Facts.*

In 1946, Local 32 and the other local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("United Association") in the state of Washington began joint bargaining, on a statewide basis, with employers in the plumbing and pipefitting industry. The local unions bargained through the Washington State Association of the United Association ("State Association"), a statewide labor union. The employers bargained through the Washington State Employers Council for the Plumbing and Pipefitting Industry ("State Employers Council"), a statewide employers' association.

The 1951 statewide collective bargaining agreement and each subsequent renewal of it contained language referring to a certain trust agreement creating the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust ("State Welfare Trust"), a joint labor-management trust fund organized under the provisions of § 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c). The statewide agreement obligated employers to make contributions to the State Welfare Trust at a specified rate per employee per hour worked. With the contributed funds, the trustees of the State Welfare Trust ("State Trustees") were to and did provide a program of health and welfare benefits, including medical, time-loss, and death benefits, to all employees in the statewide bargaining unit.

In 1967, Local 32, representing union employees in the Seattle area, withdrew from the statewide bargaining unit and created a new and independent bargaining unit limited to the geographical jurisdiction of Local 32. This the Local 32 members were privileged to do under § 7 of the National Labor Relations Act, 29 U.S.C. § 157. Local 32 and the employers in the Seattle area entered a new collective bargaining agreement, effective January 1, 1968, which provided that thereafter the employers would make contributions to a newly-created Seattle Area Plumbing and Pipefitting Industry Health and Welfare Trust ("Seattle Area Welfare Trust").

Shortly after the establishment of the Seattle Area Welfare Trust, its trustees demanded that the State Trustees

relinquish to the Seattle Area Welfare Trust a portion of certain uncommitted reserves accumulated in the State Welfare Trust. The demand was refused, and this action followed.

The reserves in question represented (1) employer contributions exceeding the amount of insurance premiums paid by the trust and trust administrative expenses; (2) forfeitures of the credits of union members, including members of Local 32, under the so-called "hour bank" eligibility program;[1] (3) refunds received from the insurance carrier because of favorable claims experience; and (4) interest on investments. According to the plaintiffs in this action, the uncommitted reserves totalled approximately $953,000 at the time when the Local 32 members withdrew from the State Trust. Had the State Trust been dissolved at that point and all liabilities been paid, this sum, less costs of dissolution, would have remained. The plaintiffs maintain that an accounting will show that approximately 40 percent of the reserves, or $371,200, are attributable to contributions made by Seattle area employers on behalf of Local 32 members.

Plaintiffs, appellants here, are 14 individual members of Local 32 claiming to represent the class of all 1400 of such members.[2] The trustees of the Seattle Area Welfare Trust are also nominal plaintiffs, but Local 32 as an entity was not made a party because trust benefits accrue to its members individually and not to the union itself. At the present stage of the litigation the only defendants are the State Trustees. In an amended complaint, the plaintiffs also named as defendants the original parties to the statewide collective bargaining agreement, namely, the State Association and the State Employers Council. However, upon those parties' disclaimer of any interest in the outcome of

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1. Under the hour bank program, all contributions paid by an employer for an employee, up to a maximum of 840, are credited to that employee's hour bank. For each 140 hours of contributions in his bank, the employee receives one month of future paid-up eligibility. After an employee has accrued 840 unused hours in his bank, any additional contributions which the employer may pay for him are forfeited to the general reserves of the trust.

2. Whether this action is properly a class action is a question not now before us.

the lawsuit and upon the plaintiffs' concession that no claim could be established against those parties, the district court dismissed the State Association and the State Employers Council from the case before considering the subject matter jurisdictional issues.

In their amended complaint the plaintiffs assert: (1) that they are entitled to an accounting by the State Trustees, (2) that they are entitled to a declaration of their rights in the reserves, (3) that the State Trustees should be required to apply a portion of the reserves for their benefit, (4) alternatively, that the State Trustees should be required to transfer a portion of the reserves to the Seattle Area Welfare Trust, (5) or that the State Welfare Trust be terminated and a portion of its assets be distributed to them or for their benefit, (6) that the State Trustees should be enjoined from using a portion of the reserves for the benefit of anyone but Local 32 members.

As to jurisdiction, the plaintiffs claim that the State Trustees are violating the statewide collective bargaining agreement, a claim over which the federal courts have jurisdiction under § 301(a) of the Taft-Hartley Act, and that they are violating § 302(c)(5) of the same act, a claim over which the federal courts have jurisdiction under § 302(e).

II. *The Trial Court's Decision.*

The State Trustees moved for summary judgment on the ground that the court did not have jurisdiction under either § 301(a) or § 302(e). The court granted the motion and entered a judgment reading as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions of defendants and each of them to dismiss and for summary judgment of dismissal be, and the same hereby are, granted; that this action be, and hereby is, dismissed for lack of federal jurisdiction *in failing to establish a federal cause of action* and that defendants have judgment for their costs and disbursements herein to be taxed.

(The language in italics was interlineated by the Judge.)

We construe this as a ruling that the court lacked subject matter jurisdiction, not as a decision that the plaintiffs have no claim even if the court has jurisdiction. This is a case in which the jurisdiction of the federal court depends upon the subject matter of the claim, not the status of the parties, as in diversity cases, or the locus in which the claim arose, as in federal enclave cases. *Bell v. Hood*, 1946, 327 U.S. 678, tells us that in subject matter jurisdiction cases, jurisdiction "is not defeated . . . by the possibility that the avertments might fail to state a cause of action [claim] on which [plaintiffs] could actually recover. . . . [T]he failure to state a proper cause of action [claim] calls for a judgment on the merits and not for a dismissal for want of jurisdiction" (327 U.S. at 682). In the case at bar, the court found that it did not have jurisdiction and dismissed on that ground. It did not take the next step and decide that the claim was bad on the merits. As the Court said in *Bell v. Hood*, that issue "must be decided after and not before the Court has assumed jurisdiction over the controversy." *Id.*

We conclude that the court did have jurisdiction under both § 301 and § 302(e). Our reluctance to hand down a decision that appears to enlarge the jurisdiction of the federal courts—to "fire a jurisdictional cannon which will be heard on future battle grounds" (Goldberg, J., in *Mumford v. Glover*, 5 Cir., 1974, 503 F.2d 878, 880)—is somewhat diminished by the action of the Congress in adopting the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406, 88 Stat. 829). That Act imposes very broad jurisdiction upon the federal courts in cases involving welfare trusts such as those involved here, § 502, and broadly supersedes, effective January 1, 1975, otherwise applicable state laws, § 514. If we are firing a cannon, the Congress has blown up a dam.

III. *Section 301(a) Jurisdiction.*

Section 301(a) of the Taft-Hartley Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties 29 U.S.C. § 185(a).

Here there is no dispute that the statewide plumbing and pipefitting industry does affect commerce within the statutory meaning. *See, e.g., Local 44 and Washington State Association,* 195 N.L.R.B. 225 (1972). Our inquiry then is whether the following three jurisdictional requisites are satisfied: (1) a contract; (2) a claim of violation; and (3) a "between" employer and labor organization or "between" labor organizations element.

To find the first element, we examine the relationship between the statewide collective bargaining agreement and the State Welfare Trust agreement. Each of the successive statewide bargaining agreements, including the 1965 agreement relevant here, provided in relevant part:

> Subject to the trust agreement supplement hereto, Management agrees to contribute certain hourly amounts [for health and welfare, vacation, pension, training and other industry benefit funds] as shall from time to time be determined by the Washington State Board of Negotiators.

Article IV of the trust agreement thus referred to as a supplement to the labor-management collective bargaining agreement provides in relevant part:

> This Agreement is and shall be deemed a supplement to the Labor-Management Agreement of the Plumbing and Pipefitting Industry of the State of Washington and every Employer who is a party to the Agreement shall become a party to this Agreement. *Any violation of this Agreement,* or failure to become a party thereto, *shall be deemed a violation of the Labor-Management Agreement* and shall be grounds for the cancellation or forfeiture thereof. (emphasis added)

Separate documents are frequently used to define the rights and obligations contemplated in a single conceptual contract. That the parties here intended the trust agreement to form "part and parcel" of the collective bargaining contract is evident. We therefore conclude that the world "contract" as it appears in § 301(a) encompasses the provisions of a welfare trust, such as this, established as a supplement to and referred to in a collective bargaining agreement. The two together are the "contract." *AFL v. Western Union Telegraph Co.,* 6 Cir., 1950, 179 F.2d 535, 538; *Smith v. DCA Food Industries, Inc.,* D. Md., 1967, 269 F. Supp. 863, 868. *Cf. Retail Clerks International Association v. Lion Dry Goods, Inc.,* 1962, 369 U.S. 17 (the word "contracts" in § 301 is not limited to collective bargaining agreements but includes strike settlement agreements, for example, as well).

To establish § 301(a) jurisdiction, plaintiffs must further allege a breach of the contract. *Beriault v. Local 40, Super Cargoes & Checkers, ILWU,* 9 Cir., 1974, 501 F.2d 258, 261. This the plaintiffs have done by pointing to two provisions of the trust agreement. Article VIII, Section 2, of that agreement specifies:

> The benefits provided by the Health and Welfare Account will be paid only to Employees who have been, or who shall hereafter be, employed or available for employment under the jurisdiction and terms of the Labor-Management Agreement. . . . Such Employees shall be deemed "qualified" for the aforesaid benefits from the Health and Welfare Account, subject to the terms of eligibility established by the Board of Trustees in accordance with this Agreement.

Section 3 of the same article further specifies that the trustees shall establish eligibility rules taking into account "all factors necessary for the proper administration and the financial security" of the health and welfare plan. Plaintiffs assert that the trustees' refusal to allocate to or for the benefit of the withdrawing but otherwise "qualified" Local 32 members a prorated share of the reserves was not "necessary for the proper administration and financial security of the trust fund," and that this conduct therefore violated Section 2 of Article VIII of the trust agreement and an implied duty of the trustees not to adopt arbitrary and capricious eligibility rules. *Cf. Giler v. Board of Trustees of Sheet Metal Workers Pension Plan,* 9 Cir., Sept. 3, 1974, ... F.2d ..... (No. 73-1149) (applying the arbitrary and capricious standard to eligibility rules framed by pension plan trustees in a case involving an alleged violation of § 302(c)(5), but finding no arbitrariness or caprice).

Whether these allegations are substantial enough to carry the day for plaintiffs on the merits does not concern us. We think the plaintiffs have sufficiently alleged a breach of the collective bargaining contract to satisfy that element in the jurisdictional formula. *Compare Fiorelli v. Kelewer*, E.D. Pa., 1972, 339 F. Supp. 796, *aff'd without published opinion*, 3 Cir., 1973, 474 F.2d 1340, on which the defendant State Trustees rely, where the court technically found jurisdiction but held there was no cognizable § 301(a) claim because the plaintiffs had alleged neither the existence nor the breach of any labor-management contract. Here plaintiffs have alleged a breach.

The State Trustees argue, however, that plaintiffs fail the "betweenness" requirement of § 301 jurisdiction because neither a labor union nor an employer is a party to this lawsuit. The dispute here, as the dismissal of the State Association and the State Employers Council from the case underscores, is between the members of Local 32 on one hand and the State Trustees on the other. But that does not foreclose federal jurisdiction. As the Supreme Court held in *Smith v. Evening News Association*, 1962, 371 U.S. 195, § 301 refers to "contracts" between an employer and a labor organization—not to "suits" between them. In *Smith* the Court held that, without joining the union as a party plaintiff, individual employees can sue under § 301 to enforce rights arising from a labor contract.

We do not accept the State Trustees' argument that *Smith* nonetheless implies that either a union or an employer must be a party to the action if § 301 is to be invoked. We think that such a requirement would be inconsistent with the Court's instruction in *Smith* that § 301(a) is not to be given a narrow reading. 371 U.S. at 199. *See Textile Workers v. Lincoln Mills*, 1957, 353 U.S. 448, 456-57. Although this precise point does not seem to have been expressly conisdered by any other federal court, we note that at least one district court has accepted jurisdiction under § 301(a) in a suit by an individual employee against the trustees of a labor-management pension trust where neither the union nor the employer was a party. *Brune v. Morse*, E.D. Mo., 1972, 339 F. Supp. 159, *aff'd*,

8 Cir., 1973, 475 F.2d 858 (action challenging pension eligibility rules).[3]

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3. *See also Franciosa v. Bricklayers Fund Office*, S.D.N.Y., 1974, 72 L.C. 28, 857 (action by union member against trust fund successfully invoked jurisdiction under §§ 301 and 302); *Hancock v. Central States Pension Fund*, S.D. Ind., 1973, 84 L.R.R.M. 2635 (action by union member against pension fund and trustees for additional benefits from fund founded on § 301 jurisdiction). No union or employer was involved in either case.

Many federal courts have accepted § 301(a) jurisdiction in disputes involving welfare and pension plans where the union, the employer, or both, were involved in the lawsuit. *E.g., Tolbert v. Union Carbide Corp.*, 4 Cir., 1974, 495 F.2d 719 (§ 301 jurisdiction existed, and therefore federal substantive law applied, for employee's claim against employer for benefits under disability and pension plans for injury sustained while laid off); *AFL v. Western Union Telegraph Co.*, 6 Cir., 1950, 179 F.2d 535 (action by employee against employer for pension benefits); *Rothlein v. Armour and Co.*, W.D. Pa., 1974, 377 F. Supp. 506 (action by employees to determine rights on transfer from one pension plan to another); *International Union of Brewery Workers v. Duke & Co., Inc.*, W.D. Pa., 1974, 373 F. Supp. 778 (suit by union to determine rights of participant union members upon termination of business and pension plan); *Sheet Metal and Roofing Contractors' Association v. Liskany*, S.D. Ohio, 1974, 369 F. Supp. 662 (action by employers against trust employees for diversion of trust funds; jurisdiction invoked under both §§ 301 and 302); *International Association of Machinists, Lodge 1194 v. Gar Wood Industries, Inc.*, N.D. Ohio, 1973, 368 F. Supp. 357 (action by former employees asserting rights to pension payments from employer on the closing of a plant and termination of pension plan); *Local 626, United Bhd. of Carpenters v. Delaware Contractors Association*, D. Del., 1972, 344 F. Supp. 1281, *aff'd per curiam*, 3 Cir., 1973, 477 F.2d 564 (action to determine lawfulness of administration of certain vacation fund); *International Union, UAW v. Anaconda American Brass Co.*, E.D. Mich., 1972, 340 F. Supp. 651, *modified*, 6 Cir., 1973, 475 F.2d 682 (action by union involving rights of laid-off workers to early retirement benefits under pension agreement); *Knoll v. Phoenix Steel Corp.*, E.D. Pa., 1971, 325 F. Supp. 666, *aff'd*, 3 Cir., 1972, 465 F.2d 1128, *cert. denied*, 1973, 409 U.S. 1126 (action by former employees to discontinue pension fund and distribute assets to beneficiaries upon closing of plant); *United Brick and Clay Workers v. Internationel Union of District 50, UMW*, E.D. Mo., 1970, 315 F. Supp. 224, *aff'd*, 8 Cir. 1971, 439 F.2d 311 (action by employees who selected a new union against old union and employer to continue pension plan in effect by substituting new union for old); *Hauser v. Farwell, Ozmun, Kirk & Co.*, D. Minn., 1969, 299 F. Supp. 387 (action by former employees to recover money in pension fund upon plant closing); *Raymond v. Hoffman*, E.D. Pa., 1966, 284 F. Supp. 596 (action by trustees of new local union pension plan formed after union schism against trustees of old union's pension plan for aliquot share of trust reserves under a contract made between

We are mindful that the court in *Bowers v. Ulpiano Casal, Inc.*, 1 Cir., 1968, 393 F.2d 421, 423, found central in *Smith, supra,* the underlying rationale that § 301(a) jurisdiction obtains in employee-employer disputes because of the grave questions concerning the interpretation and enforceability of collective bargaining agreements that such disputes pose. Here, the State Trustees argue, there is no need for § 301 jurisdiction because there is no possibility of labor-management strife. Of that, however, we cannot be certain. The danger may be attenuated, but it is conceivable that the State Trusteees' conduct in withholding the reserves could disrupt the collective bargaining process. "To deprive [a union member of his potential benefits from a pension or welfare fund] because he shifts his allegiance to another union would seriously inhibit his freedom of choice, which is central to collective bargaining." Summers, *Union Schism in Perspective,* 45 Va. L. Rev. 261, 279 n. 84 (1959), also quoted in *Raymond v. Hoffman,* E.D. Pa., 1966, 284 F. Supp. 596, 602 n. 14, holding that, where certain union members left the union to form a new local and the unions then agreed to divide the old union's assets ratably, § 301(a) jurisdiction existed over an action by the trustees of the new local's pension plan against the trustees of the old union's pension plan for an aliquot share of its reserves.

We hold that § 301(a) jurisdiction exists over the claim of the plaintiffs in this case.

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the unions); *Smith v. DCA. Food Industries, Inc.*, D. Md., 1967, 269 F. Supp. 863 (action by certain employees against employer and union for pension benefits which were denied upon plant closing); *Bey v. Muldoon,* E.D. Pa., 1963, 217 F. Supp. 404 (action involving interests of longshoremen in technological improvement fund set up under collective bargaining contract); *Local 90, Stove Mounters' International Union v. Welbilt Corp.*, E.D. Mich., 1959, 178 F. Supp. 408, *aff'd without opinion,* 6 Cir., 1960, 283 F.2d 868 (action to compel employer's payments to pension fund); *United Construction Workers v. Electro Chemical Engraving Co.*, S.D.N.Y., 1959, 175 F. Supp. 54 (action to compel employer's payments to welfare and pension funds). *See also Hammil v. Stubnitz Spring Division,* E.D. Pa., 1973, 85 L.R.R.M. 2231; *International Union of Brewary Workers v. Stegmaier Brewing Co.*, M.D. Pa., 1972, 79 L.R.R.M. 2765; *Retail Clerks Union, Local 1460 v. Newberry, Wabash, Inc.*, N.D. Ind., 1971, 79 L.R.R.M. 2847; *Abruscato v. Local 199, Industrial Workers,* S.D.N.Y., 1968, 69 L.R.R.M. 2537.

IV. *Section 302(e) Jurisdiction.*

Section 302(e) of the Taft-Hartley Act, which the Local 32 members contend provides a second, independent jurisdictional base for their action, states in relevant part:

> The district courts of the United States . . . shall have jurisdiction, for cause shown, . . . to restrain violations of this section. . . . 29 U.S.C. § 186(e).

Section 302 in general forbids an employer to make any payment of money to any representatives of its employees and forbids such representatives to accept such payments. Section 302(c)(5) creates an exception for payments to an employee welfare or pension fund by stating that the general prohibitions of § 302 do not apply:

> with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer,* and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making simlar payments, and their families and dependents). . . . 29 U.S.C. § 186(c)(5) (emphasis added).

Plaintiffs rely on the "sole and exclusive benefit" language and argue that payments which were made by Local 32 employers to the State Welfare Trust for the benefit of their employees and to which a share of the reserves that the State Trustees refuse to relinquish is attributable will be used by the State Trustees for the benefit of persons other than Local 32 employees, that is, for the benefit of the remaining beneficiaries of the State Trust.

The dominant legislative purpose of the § 302 restriction on payments to employee representatives was to prevent employers from tampering with the loyalty of union officials, and to prevent union officials from extorting tribute from employers. *United States v. Ryan,* 1956, 350 U.S. 299, 304-06; *Bowers v. Ulpiano Casal, Inc.*, 1 Cir., 1968, 393 F.2d 421, 425. Whether § 302(e) was meant to extend beyond cases involving the possibilities of such corruption is unclear. Although there are indications in congressional debates that § 302(e) was intended to have

a broad sweep, the legislative history is inconclusive. *Lugo v. Employees Retirement Fund*, E.D.N.Y., 1973, 366 F. Supp. 99, 101 n. 2. *Compare Copra v. Suro*, 1 Cir., 1956, 236 F.2d 107, 115 (tentatively reading § 302(e) to create a broad federal equity jurisdiction over the administration of welfare funds "whose life in effect depends on the permissive exception of § 302(c)(5)") *with Bowers v. Ulpiano Casal, Inc., supra*, 393 F.2d at 425 (acknowledging suggestions in the debates that employees could invoke § 302(e) to challenge the administration of such funds but repudiating the broad interpretation proposed in *Copra*). *See generally* Legislative History of the Labor Management Relations Act, 1947 (U.S. Govt. Printing Office 1948).

Notwithstanding ambiguous legislative history, § 302 (e) jurisdiction has been successfully invoked in a number of cases where it was alleged, as here, that a trust fund was not being administered for the "sole and exclusive benefit" of the employees of the contributing employers. *E.g., Blassie v. Kroger Co.*, 8 Cir., 1965, 345 F.2d 58 (action by contributing employers successfully challenging, among other administrative matters, the use of trust property for a pharmacy offering discounts to persons other than trust beneficiaries); *Lugo v. Employees Retirement Fund*, E.D.N.Y., 1973, 366 F. Supp. 99 (action by employee challenging eligibility requirements for disability and retirement benefits under the provisions of a certain pension fund); *Insley v. Joyce*, N.D. Ill., 1971, 330 F. Supp. 1228 (action by employee challenging "break-in-service" provision in pension plan excluding for eligibility purposes any service predating an interruption in employment of more than three years); *Porter v. Teamsters Funds*, E.D. Pa., 1970, 321 F. Supp. 101 (class action by union members against trustees alleging diversion of trust funds and receipt of unlawful compensation); *Giordani v. Hoffman*, E.D.Pa., 1969, 295 F. Supp. 463 (action by employees against health and welfare fund trustees alleging broadly that funds were not *established* for the "sole and exclusive benefit" of the employees of the contributing employers); *Bath v. Pixler*, D. Colo., 1968, 283 F. Supp. 632 (action to determine proper disposition of health and welfare funds on termination of old trust

and establishment of new trust); *Raymond v. Hoffman*, E.D.Pa., 1966, 284 F. Supp. 596 (action by trustees of pension plan of new local against trustees of pension plan for old union demanding aliquot portion of reserves).

Raymond v. Hoffman, a case much like the one at bar, found § 302(c) jurisdiction without distinguishing the types of cases that might be cognizable under that section. However, based on language in *Bowers, supra*,[4] the more recent of these cases, *Lugo, Insley, Porter*, and *Giordani*, have recognized a distinction between actions involving "structural" deficiencies in the relevant trust which cause it to violate the "sole and exclusive benefit" provision of § 302(c)(5) and actions involving only questions of day-to-day fiduciary administration of welfare and pension funds. Section 302(e), these cases say, provides jurisdiction over the former but not the latter.

Accepting this distinction for the moment, we conclude that the claim of the plaintiffs in this case involves a "structural" rather than an "administrative" matter. Here, a substantial number of the employer parties to the State Welfare Trust have withdrawn and are no longer making contribtuions to it. Those employers and their employees have agreed to set up and have set up a new Seattle Area Welfare Trust. It is unclear whether those employees of Local 32 who were beneficiaries before the withdrawal remained beneficiaries of the State Welfare Trust or, if

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4. That language in *Bowers* is:
> We are, however, persuaded that the weight of reason and authority compels a narrow reading of section 302(e). In the first place, its language limits federal courts "to restrain violations of this section." These violations, if we read correctly, are violations of basic structure, as determined by Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund. 393 F.2d at 424.

However, the *Bowers* court interpreted § 302(e) much more narrowly than the case before it required. Stripped of surplusage, the holding of *Bowers* is really that § 302(e) does not confer federal jurisdiction over claims of wrongful diversion of trust funds brought against third parties who are neither unions, employers, nor trustees, who allegedly received monies from the fund "with knowledge that such transactions were illegal, imprudent, or in breach of fiduciary obligations." 393 F.2d at 422, 426. Identical claims against the principal parties apparently were not dismissed for want of jurisdiction and were not before the *Bowers* court.

so, how and to what extent. The action of the State Trustees in forfeiting the hourbank credits of the Local 32 members indicates that the trustees no longer consider them to be beneficiaries. Before the withdrawal, the reserves were held for the benefit of all employees, statewide. After the withdrawal, and if the Local 32 members ceased to be beneficiaries, the number of beneficiaries was markedly reduced. Yet the State Trustees still have the same reserves, and appear to take the position that they are now held only for the benefit of beneficiaries other than the Local 32 members. Surely these changes do not involve mere administration of the trust. They involve a rather drastic change in its structure. The plaintiffs here are not seeking individual specific benefits that have been denied them. They seek a determination that, as a group, Local 32 members have interests in the trust as a whole which have been denied to them.

The structural deficiency test does not depend solely on the structure of the trust fund at its inception. As the court in *Porter, supra,* reasoned:

> [T]he claims relating to structural violations need not be directed to the point in time when the trust funds were created and the first contributions made. To so hold would create grave practical problems. Let us suppose, for example, that a trust fund is created and initially administered in accordance with the structural requirements of Section 302(c)(5). If at some future point during the trust fund's existence it were either amended or administered in such a way as not to comply with those provisions, such would be a structural violation over which this Court would have jurisdiction under Section 302. Such a conclusion is necessary to protect the beneficiaries and the funds previously paid into the trust. 321 F. Supp. at 103-04.

In *Insley, supra,* which involved a "break-in-service" disqualifying rule adopted by trustees of a pension fund, the court refuted the trustees' claim that no "structural" deficiency was alleged, using the following reasoning:

> A careful reading of the complaint, however, indicates that the plaintiff specifically alleges that the break-in-service provision of the Pension Plan, which in effect divested him of the contributions made by employers on his behalf, renders the Plan violative of Section 302(c)(5) because the Plans thus structured is not one for the sole and exclusive benefit of employees of the employers who have made substantial contributions to the Pension Fund. While the plaintiff does not allege the most obvious types of poetential structural violations such as siphoning of trust funds for union purposes or lack of an annual audit, he does allege, in effect, that the divesting procedures adopted by the Fund's trustees operate so as to render it not for the exclusive benefit of the employees. 330 F. Supp. at 1232.

Furthermore, in *Lugo, supra,* the court offered an even broader interpretation of the structural deficiency requirement:

> We do believe, however, that a trust fund which authorizes the trustees to act arbitrarily and capriciously to exclude from eligibility certain potential employee-beneficiaries, has a structural defect in that it fails to satisfy the requirement that the fund shall be for the sole and exclusive benefit of all the employees. A Section 302 trust fund does not fit the categories of an ordinary trust and to that extent is *sui generis* and thus requires compliance with the objectives of Section 302. *Roark v. Lewis,* [D.C.Cir., 1968, 401 F.2d 425, 427]. In assuming jurisdiction for the enforcement of such a trust in accordance with Section 302, we do not do so under any broad chancery powers of the Court (*cf.*, e.g., *Copra v. Suro,* 236 F.2d 107 (1st Cir., 1956)), or under the theory that Section 302(e) is "the foundation stone for federal court management of trust funds." See *Bowers v. Ulpiano Casal, Inc.,* 393 F.2d at 426. Rather, we believe that jurisdiction in a case of this kind can be found within the "penumbra of express statutory mandate" of Section 302. See *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 . . . (1957). 366 F. Supp. at 103.

We agree with this interpretation.[5]

We think that this result is consonant with our previous cases where we have considered on the merits actions based on § 302(c)(5) challenging eligibility rules established by trustees of labor-management pension funds. In *Lee v. Nesbitt*, 9 Cir., 1972, 453 F.2d 1309, 1311, involving a "break-in-service" rule, we stated:

> Section 302 requires that a pension trust be "for the sole and exclusive benefit of employees." The trustees of such a trust, while possessing a large measure of discretion in precsribing conditions of eligibility for benefits, owe a fiduciary duty to the employees and may neither impose unreasonable conditions of eligibility nor act arbitrarily in determining who is eligible.

There, however, we did not reach the jurisdictional question because federal jurisdiction rested on diversity of citizenship. In *Giler v. Board of Trustees of Sheet Metal Workers Pension Plan*, 9 Cir., Sept. 3, 1974, ... F.2d ..... (No. 73-1149, amended January 7, 1975), also involving a "break-in-service" rule, we adhered to the *Lee* standards, stating:

> The trustees of a pension plan established under 29 U.S.C. § 186(c)(5) [§ 302(c)(5) of Taft-Hartley] have broad discretion in setting eligibility rules. A court should interfere only when the rule is unreasonable or its enforcement arbitrary. Slip op. at 2.

We there affirmed the lower court's dismissal of the action because the plaintiff failed to show that the rule was unreasonable or that the trustees arbitrarily or capriciously enforce the rule with respect to him. We did not discuss jurisdiction.

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5. Under the circumstances, we need not consider whether the structural deficiency versus administration dichotomy is a sound basis for limiting our jurisdiction. One court has concluded that whether that test ought to be the legal standard, and what constitutes a structural defect, raise such "difficult and complicated issues" that, when recently faced with the problem, it purported to avoid deciding those jurisdictional issues by proclaiming the § 302(c)(5) claim before it inadequate on the merits. *de Loraine v. MEBA Pension Trust*, 2 Cir., 1974, 499 F.2d 49, 51 n.9.

We express no opinion as to the merits of plaintiffs' claim(s). We only hold that the district court had jurisdiction under both § 301(a) and § 302(e) of the Taft-Hartley Act.

Reversed and remanded for further proceedings.

APPENDIX B

Memorandum Decision of District Court

"UNITED STATES DISTRICT COURT

December 21, 1972

[Names and addresses of counsel deleted]

Re: William J. Alvares, et al. v. Haven Erickson, et al. No. 8755, U.S.D.C., W.D. Wash.

Gentlemen:

Please consider this letter as the Court's memorandum decision on defendants' motion to dismiss and for summary judgment. By agreement, the union and the employer have been dismissed by minute order previously entered. Defendants may prepare and present appropriate order and judgment for entry.

Plaintiffs' action is based on sections 301 and 302 of the National Labor Relations Act. In the Court's opinion, section 301 of the Act has no application in the matter of trust administration, particularly where neither the union nor the employer are parties, unless a violation of the terms of the collective bargaining agreement is presented. Here, the only violation alleged is a general claim that defendant trustees, by refusing to allocate a portion of the fund reserves to withdrawing plaintiffs, breached their duty to provide specified benefits to qualified employees. But this same charge, express or implied, would underlie virtually every claim for trust benefits. Were the courts to accept jurisdiction in this type of case, it would be tantamount to a determination that the administration of employer-employee trust funds is a matter of federal court jurisdiction. Where neither employer nor union are parties, and where violation of specific terms of a collective bargaining agreement are not involved, the majority rule (and in this Court's opinion the better rule) is that section 301 is not applicable.

Plaintiffs also charge that the trustees' refusal to allocate a portion of the reserves to withdrawing members is a violation of section 302. However, section 302 is concerned with the structure of the fund—not with the administration of a properly structured fund. There is no claim here that trust funds will be devoted to non-employees of contributing employers. The validity of the trust purposes is not an issue, only its administration.

Finally, plaintiffs argue that the Court should retain jurisdiction because of pendent claims. The rule, however, is that when federal claims are dismissed before trial, state claims will also be dismissed.

Very truly yours,

/s/ Morrell E. Sharp
United States District Judge"

Supreme Court, U. S.
FILED
JUL 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1540

HAVEN ERICKSON, WILLIAM L. KLINGAMAN, RAY S. MCKNIGHT and JAMES O. PAUTZKE, Trustees of the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust,
Defendants-Petitioners

and

WASHINGTON STATE ASSOCIATION OF THE UNITED ASSOCIATION, a labor union, and the WASHINGTON STATE EMPLOYERS COUNCIL FOR THE PLUMBING AND PIPEFITTING INDUSTRY, an employer association,
Additional Defendants-Petitioners,

v.

WILLIAM J. ALVARES, WILLIAM BADEN, BERNARD BROMLEY, VICTOR R. CHARCRAFT, ALBERT D. ERDMAN, ERNEST E. GRAVES, J. W. JENSEN, MILO E. KROLL, HAROLD L. SHIPMAN, JAMES M. SMITH, AUSTIN SOFIE, DANIEL B. SWEENEY, NORMAN W. SWENSON and JAMES R. YATES, individually and as representatives of a class of persons hereinafter described,
Plaintiffs-Respondents,

and

THOMAS ALBRO, WILLIAM BOTTING, PAUL HOLMES, JOSEPH MCCAFFREY, DELL PETERSON and DALE SMITH, Trustees of the Seattle Area Plumbing and Pipefitting Industry Health and Welfare Trust,
Nominal Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED. THIS IS NOT A CASE OF "FIRST IMPRESSION" NOR DOES IT INVOLVE AN ISSUE OF "SIGNIFICANCE"

This litigation, initiated in the United States district court for the Western District of Washington, involves a claim by

members of Plumbers Union Local 32,[1] of Seattle, Washington, for a share of the uncommitted reserves of the Washington State Plumbing and Pipefitting Industry Health and Welfare Trust, a joint labor-management trust fund in which such members formerly participated. The facts giving rise to the litigation are fully set out in the opinion below (Petition, pages A-2 to A-4).

The jurisdiction of the district court was invoked under Sections 301(a) and 302(e) of the Taft-Hartly Act (29 U.S.C. Secs. 185(a) and 186(e)) but the district court dismissed, holding that neither section was applicable (Petition, pages A-18 to A-19).

The Ninth Circuit reversed, finding federal court subject matter jurisdiction under both Sections 301(a) and 302(e) (Petition, pages A-5 to A-17). The cause was remanded for further proceedings (Petition, page A-17).

Petitioners' main argument, in seeking a writ of certiorati, in that this is a case of "first impression" involving the "highly significant issue" of the extent of federal jurisdiction in cases dealing with welfare or pension plans.[2] It is asserted:

> "The Court of Appeals' holding, if allowed to stand, would extend federal jurisdiction into areas of labor-management relations in which the participation of the federal courts is unnecessary, the parties having an adequate forum in the state courts" (Petition, page 9).

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 32.

2. This argument is developed in Parts I and II of the Petition (pages 9-15). Parts III and IV (pages 16-21) assert two additional reasons why certiorari should be granted, both of which appear as meritless afterthoughts, and to which no response is needed.

This is not a case of "first impression". The exercise of Section 301(a) and 302(e) federal court jurisdiction, to resolve controversies involving labor-management welfare or pension plans, has been recognized or approved in numerous district court and Court of Appeal decisions, all of which are cited in the thorough opinion of the Court below.

Further, if there were any doubt as to the intent of Congress with respect to the use of the federal forum in welfare or pension plan disputes, that doubt has been resolved through the passage of the Employee Retirement Income Security Act of 1974 (Pub. L.93-406, 88 Stat. 829). Section 502(a)(1)(B) of the new law provides that a plan participant or beneficiary can bring an action "to recover benefits due to him under the terms of his plan,[3] to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"; Section 502(a)(2) provides that a plan participant or beneficiary can bring an action for redress of breaches of fiduciary responsibility by those fiduciaries who administer his plan; and Section 502(a)(3) provides that a plan participant or beneficiary can bring action to enjoin any act in violation of the statute, or of a plan, or to obtain appropriate equitable relief. Section 502(e)(1) gives federal district courts jurisdiction over all such actions. Additionally, Section 514(a) provides that ERISA pre-empts all state laws relating to employee benefit plans. As stated in the opinion below:

> "We conclude that the court did have jurisdiction under both Sec. 301 and Sec. 302(e). Our reluctance to hand down a decision that appears to enlarge the

3. "Plan is defined as meaning an employee welfare plan or an employee pension plan (Section 3 (3)).

> jurisdiction of the federal courts—to "fire a jurisdictional cannon which will be heard on future battle grounds" (Goldberg, J., in *Mumford v. Glover*, 5 Cir., 1974, 503 F.2d 878, 880)—is somewhat diminished by the action of the Congress in adopting the Employee Retirement Income Security Act of 1974 (Pub. L.93-406, 88 Stat. 829). That Act imposes very broad jurisdiction upon the federal courts in cases involving welfare trusts such as those involved here, Sec. 502, and broadly supersedes, effective January 1, 1975, otherwise applicable state laws, Sec. 514. If we are firing a cannon, the Congress has blown up a dam." (Petition, page A-5).

The action of Congress in providing, in Section 502 of ERISA, broad federal court jurisdiction over controversies concerning welfare and pension plans effectively moots Petitioners' claim that the Taft-Hartley Section 301(a) and 302(e) jurisdictional issues involved in this case are "significant" enough to command the attention of this Court. Jurisdiction of future federal court actions asserting claims of the nature set out in the instant litigation will rest primarily, if not exclusively, on Section 502 of ERISA, rather than on Sections 301(a) and 302(e) of Taft-Hartley. The Section 301(a) and 302(e) issues involved here are not of a continuing or recurring nature. A decision of this Court as to these issues will benefit only the immediate litigants.

There are no "special and important reasons" compelling a review of the opinion below. The petition for writ of certiorati should be denied.

Respectfully submitted,

DONALDSON & KIEL, P.S.
RICHARD P. DONALDSON
Attorneys for Plaintiffs-Respondents